

**Final Report of the Assumable Waters Subcommittee
Submitted to the National Advisory Council for Environmental Policy
and Technology (NACEPT)
May 2, 2017**

Table of Contents

Executive Summary	1
1. <i>Problem statement</i>	1
2. <i>Underlying assumptions</i>	1
3. <i>Subcommittee activities</i>	2
4. <i>Subcommittee Findings and Recommendations</i>	2
5. <i>Implementation and Process Recommendations</i>	4
REPORT	5
1. <i>Statement of the Problem</i>	5
2. <i>Background</i>	5
a. What is assumption?	5
b. Tribal considerations regarding assumption	6
c. Overview of Assumption by Michigan and New Jersey	7
d. No Further Assumption by States or Tribes since the 1990s	8
e. The Importance of Assumption to States and Tribes	8
f. Establishment of the Subcommittee	9
g. Operation of the Subcommittee	10
h. About the Writing of this Report	11
3. <i>Origin and Purpose of Section 404(g)</i>	12
a. Organization of the work group	12
b. Background on Navigable Waters to be retained by the USACE as defined in Section 404(g)(1)	12
c. Background of Adjacent Wetlands to be retained by the USACE	14
4. <i>Description of Alternatives for Identifying Waters (other than Wetlands) Assumable by a State or Tribe, and Waters that Must be Retained by the USACE</i>	15
a. Waters Alternative A: Case-by-case determination of USACE-retained and state- or tribal-assumable waters at the time of program assumption (the status quo).	16
b. Waters Alternative B: Primary Dependence on RHA Section 10 Lists of Navigable Waters to Define USACE-Retained Waters	16
c. Waters Alternative C: Rivers and Harbors Act (RHA) Section 10 Waters plus CWA 33 CFR 328.3(a)(1) Waters as Retained Waters.	17
5. <i>Subcommittee Discussion and Recommendations for Identifying Retained Waters</i>	19
a. <u>Majority recommendation</u> : Waters Alternative B – Primary Dependence on RHA Section 10 Lists of Navigable Waters to Define USACE Retained Waters	19
b. USACE recommendation: Waters Alternative C – CWA (a)(1) Waters plus Section 10 waters as Retained Waters.	24
6. <i>Consideration of Alternatives for Adjacent Wetlands Assumable by a State or Tribe, and Adjacent Wetlands that Must be Retained by the USACE</i>	25
a. Wetlands Alternative A: USACE Retains All Wetlands, Whether Touching or Not Touching, Regardless of Extent.	26
b. Wetlands Alternative B: USACE Retains Entirety of Wetlands Touching Retained Waters, Regardless of Extent	27
c. Wetlands Alternative C: Establishment of a National Administrative Boundary	28
7. <i>Subcommittee Recommendations on the Above Alternatives for Adjacency</i>	32
a. <u>Majority recommendation</u> : Wetlands Alternative C3 – USACE Retains All Wetlands Whether Touching or Not Touching Navigable Waters Landward to an Administrative Boundary Established During the Development of the Memorandum of Agreement	

with the USACE, with a 300-foot National Administrative Boundary as a Default.	32
b. <u>USACE recommendation</u> : Wetlands Alternative A – USACE Retains All Wetlands, Whether Touching or Not Touching Retained Navigable Waters, Regardless of Extent.	38
8. <i>Implementation and Process Recommendations</i>	38
a. Maintain New Jersey and Michigan 404 Assumed Programs	39
b. Develop Guidance for the Field	39
c. Provide Flexibility	39
d. Incorporate National Principles and Considerations into Field Guidance	39
e. Provide General Procedures for the Assumption Process	40
f. Utilize Best Available Technology	41
Appendix A: Tribal Findings, Issues, and Considerations during Assumption	43
Appendix B: Michigan and New Jersey’s Assumed Programs	45
Appendix C: Letter from the Association of Clean Water Administrators, the Environmental Council of the States, and the Association of State Wetland Managers	51
Appendix D: List of Subcommittee members	54
Appendix E: Subcommittee Charter	56
Appendix F: The Legislative History of Section 404(g)(1) of the Clean Water Act	57

Executive Summary

1. Problem statement

Section 404 of the Clean Water Act (CWA) authorizes the U.S. Army Corps of Engineers (USACE) to issue permits for discharge of dredged or fill material in navigable waters. “Navigable waters” is defined under the CWA to mean “the waters of the United States and territorial seas.” Section 404(g) of the CWA authorizes states,¹ with approval from the U.S. Environmental Protection Agency (EPA), to assume authority to administer the 404 program in some, but not all, navigable waters and adjacent wetlands. Section 404(g)(1) describes the waters over which the USACE must retain administrative authority even after program assumption by a state or tribe.

Only two states, Michigan and New Jersey, have been approved to assume the Section 404 Program. Other states have explored assumption, but those efforts have not borne fruit in part due to uncertainty over the scope of assumable waters and wetlands. The EPA formed the Assumable Waters Subcommittee under the auspices of the National Advisory Council for Environmental Policy and Technology (NACEPT) to provide advice and develop recommendations for NACEPT on how the EPA can best clarify for which waters a state or tribe may assume CWA section 404 permit responsibilities, and for which waters the USACE retains CWA section 404 permit responsibility under an approved state or tribal program. The Subcommittee included 22 members representing states and tribes, federal agencies, and other stakeholders. This report represents the results of the Subcommittee’s work from October 2015 to April 2017 and is being presented to NACEPT for its consideration.

2. Underlying assumptions

Recommendations to the NACEPT were developed against the background of the following assumptions.

- a. In accordance with the requirements of Section 404, a state or tribe may only be authorized to assume the Section 404 Program if it has authority over all assumable waters of the United States, and demonstrates that it will apply legal standards consistent with the Clean Water Act (CWA) requirements in operating a permitting program.
- b. Assumption by a state or tribe does not alter CWA jurisdiction over waters of the United States. Moreover, nothing in the report or recommendations of the subcommittee is intended to alter in any way the definition or scope of federal jurisdiction. Rather, this report speaks only to the administrative division of authority under Section 404 between the USACE and an approved state or tribe.

¹ Tribes were not specifically called out in the 1977 CWA amendments but are able to assume as provided in Section 518(e) of the CWA.

- c. In accordance with EPA's charge to the subcommittee, recommendations are intended to provide clarity, to be practical and readily implementable in the field, and to be consistent with the CWA, particularly Section 404(g)(1).
- d. Waters, such as rivers, lakes, and streams, and adjacent wetlands are clearly linked legally, in policy, and in hydrology, and in total are often referred to as "waters." However, for the purposes of developing recommendations and for usage in this report, the Subcommittee chose the use of two terms: "waters" and "adjacent wetlands."
- e. Since the EPA will be receiving formal advice from the NACEPT, the EPA participated actively in the discussion, formulation, and review of the alternatives and provided technical advice, but did not take a position regarding the specific recommendations made by the Subcommittee. The US FWS also participated in the discussions but did not take a position on the final recommendations. Members who took a position regarding the recommendations are referred to as "recommending members." These include all members, including the USACE, but not the US EPA and the US FWS.

3. Subcommittee activities

Subcommittee members met eight times and also worked independently from October 2015 through April 2017. Investigations and discussions were divided into three primary topics.

- a. The origins, legislative history, and processes of Section 404 state or tribal assumption. Subcommittee members, including attorneys and others, reviewed the language of Section 404(g), the legislative history, and other policy documents. The full findings of this group are included in Appendix F. The histories of the programs in Michigan and New Jersey are included in Appendix B.
- b. The extent of waters of the United States that may be assumed by an approved state or tribe, and the extent of waters where Section 404 authority must be retained by the USACE, even following state or tribal assumption. Findings and recommendations are discussed in detail in this report.
- c. The extent of wetlands that must also be retained by the USACE following state or tribal assumption. Findings and recommendations are discussed in detail in this report.

4. Subcommittee Findings and Recommendations

- a. *Waters (other than Wetlands) Assumable by a State or Tribe, and Waters that Must be Retained by the USACE*

Majority recommendation. All the recommending Subcommittee members (the majority) except the member representing the USACE recommend to NACEPT that the EPA develop guidance or regulations to clarify that when a state or tribe assumes the 404 program, the USACE must retain authority over waters included on lists of waters regulated under Section 10 of the Rivers and Harbors Act (RHA). These lists are

compiled and maintained by the USACE district offices for every state except Hawaii, and the majority of the Subcommittee recommends the lists be used with two minor modifications: any waters that are on the Section 10 lists based solely on historic use (e.g. based solely on historic fur trading) are not to be retained (based on the Congressional record and statute), and waters that are assumable by a tribe (as defined in the report) may also be retained by the USACE when a state assumes the program. The majority recognizes that waters may be added to Section 10 lists after a state or tribe assumes the program, and recommends in that case, such waters may also be added to lists of USACE-retained waters at that time.

The majority believes that this option is clear and practical, can be implemented efficiently at the time a state or tribe seeks assumption as well as in the operation of an assumed program, and is consistent with Congress' intent that the USACE retain authority over RHA Section 10 waters and adjacent wetlands. This alternative also is based on relatively stable and predictable information.

All other waters of the United States (with the exception of adjacent wetlands as discussed below) are assumable by a state or tribe.

Minority recommendation. The Subcommittee member representing the USACE recommends USACE retain authority over waters on the Section 10 lists, and also waters that have been identified as Traditional Navigable Waters (TNWs) under the CWA in accordance with USACE CWA regulations at 33 CFR 328.3(a)(1) and guidance issued by the USACE and the EPA to implement the Supreme Court's opinion in *Rapanos*, Appendix D.² Under this recommendation waters that are officially determined by a USACE district as Section 10 or stand-alone CWA (a)(1) TNW waters at the time a state or tribe assumes the program would be retained by the USACE. In addition, the District would evaluate all of its completed case-specific TNW determinations to determine whether addition of that water to the retained waters list is warranted under a stand-alone determination. Waters that are later identified and officially determined as a Section 10 or stand-alone CWA(a)(1) TNW after assumption occurs will also be added to the list of retained waters. The USACE believes there should not be a distinction between different uses of the term "navigable waters" under different sections of the statute, and believes this is consistent with the purposes of the CWA and Section 404(g). While the statutory language of the CWA Section 404(g) parenthetical waters slightly differs from the regulatory language of 328.3(a)(1), the USACE believes the interpretation of the term "navigable waters" is the same under 404(g) and 328.3(a)(1) (other than those waters considered navigable based solely on their historic use).

²Appendix D of the 2007 "U.S. Army Corps of Engineers Jurisdictional Determination Instructional Guidebook" available at: http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/app_d_traditional_navigable_waters.pdf. The Guidebook, of which Appendix D is part, was dated 1 June 2007 and signed by USACE and the US EPA on 5 June 2007.

b. Adjacent Wetlands Assumable by a State or Tribe, and Adjacent Wetlands that Must be Retained by the USACE

Majority recommendation. All the recommending Subcommittee members (the majority) except for the USACE member recommend that the EPA adopt and implement a policy under which the USACE would retain administrative authority over all wetlands adjacent to retained navigable waters landward to an administrative boundary agreed upon by the state or tribe and the USACE. The USACE CWA regulatory definition of “adjacent” would be used to identify adjacent wetlands, and the USACE would retain administrative authority only over adjacent wetlands within the agreed-upon administrative boundary. This administrative line could be negotiated at the state or tribal level to take into account existing state regulations or natural features that would increase practicability or public understanding; if no change were negotiated, a 300-foot national administrative default line would be used.

The majority of the subcommittee understands that the purpose of retention by the USACE of wetlands adjacent to Section 10 waters is primarily to ensure that the USACE has authority over activities that may alter the physical structure of the navigational channel or otherwise interfere with navigation. Thus, it believes that the extent of USACE authority over adjacent wetlands under an assumed program is reasonably limited to wetlands that are likely to affect navigation.

Minority recommendation. The representative of the USACE recommends that the USACE retain the entirety of wetlands that are “adjacent” to retained navigable waters, using the definition of adjacent wetlands currently being used by the USACE for regulatory actions under Section 404 (i.e. the wetlands defined as adjacent under 33 CFR 328.3, implemented through the 2008 Rapanos guidance). The USACE believes that this recommendation is consistent with CWA Section 404, provides clarity regarding the permitting authority, and is easily understood and implementable in the field.

5. Implementation and Process Recommendations

This report also provides general recommendations regarding the potential content of new guidance or regulations on state or tribal assumable waters, and effective procedures for implementation.